STATE OF MICHIGAN

COURT OF APPEALS

ROBYN DERBABIAN and JOHN DERBABIAN, Plaintiff-Appellees,	FOR PUBLICATION February 12, 2002 9:00 a.m.
v	No. 216024 Macomb Circuit Court
MARINER'S POINTE ASSOCIATES LIMITED PARTNERSHIP, Defendant/Third-Party Plaintiff.	LC No. 99-001674-NO
and	
S & C SNOWPLOWING, INC., Defendant/Third-Party Defendant-Appellant.	Updated Copy May 10, 2002

Before: White, P.J., and Wilder and Zahra, JJ.

WILDER, J.

In this premises liability action, defendant S & C Snowplowing, Inc., appeals as of right trial court orders denying defendant summary disposition and entering judgment in favor of plaintiffs Robyn and John Derbabian.[1] We reverse the judgment in favor of plaintiff and remand for entry of judgment in favor of defendant pursuant to MCR 2.116(C)(10).

I. Facts and Proceedings

A. The Contract

During the winter of 1995-96, defendant and Mariner's Pointe Associates Limited Partnership (Mariner's Pointe) entered into a contract for the removal of snow and ice from the Mariner's Pointe Shopping Center, located in Harrison Township. The contract specified that in exchange for a flat fee, defendant would provide snow removal services in the "parking areas,

[1] Because John Derbabian's loss of consortium claim is derivative of Robyn Derbabian's negligence action, "plaintiff" will refer to Robyn Derbabian.

entrances, receiving areas, etc.," and on "city and tenant (sic) sidewalks." The contract also specified that defendant would salt the parking areas for an extra charge of $90 per ton of salt applied, and that the salt was to be applied "by Contractor discretion."[2] The contract required that all work would "be completed in a professional manner according to standard practices."

B. Plaintiff's Injury and Lawsuit

On the morning of February 22, 1996, plaintiff arrived at Mariner's Pointe Shopping Center, got out of her vehicle, and began walking toward the Kroger store in the shopping center when she slipped and fell on ice, injuring her left ankle. Discovery evidence revealed that there was no precipitation falling at the time plaintiff fell, but that it had rained for a few hours the day before plaintiff fell. Discovery also established that defendant last plowed the parking lot on February 14, 1996, after a 4 1/2-inch snowfall and that following that snowfall, defendant applied at least eight tons of salt between February 14, 1996, and February 18, 1996. In addition, the discovery process failed to produce any evidence that defendant negligently plowed or salted the parking lot after the February 14, 1996, snowfall or that there was additional snowfall between February 14, 1996, and February 22, 1996. Discovery also established that no one—including plaintiff—had observed the ice patch before the fall, and that the ice covered an area approximately the size of two parking spaces. The record also established that there was no snow present on the surface of the parking lot at the time plaintiff fell.

Plaintiff filed suit against Mariner's Pointe, the owner and operator of the shopping center, alleging, among other things, negligent maintenance of the parking lot and negligent failure to inspect the premises for dangerous conditions. Mariner's Pointe filed a third-party complaint for indemnification or contribution against defendant. Plaintiff then filed an amended complaint that added defendant as a primary defendant. The amended complaint alleged that defendant, along with Mariner's Pointe, "exercis[ed] control over the . . . parking lots" of Mariner's Pointe at the time of plaintiff's fall and that, on the basis of this control, defendant owed plaintiff a duty to exercise reasonable care to diminish the danger associated with accumulated ice and snow within a reasonable time after its accumulation and to ensure that the parking lot was maintained in a safe condition. Plaintiff also alleged that defendant's negligence in failing to inspect the parking lot for dangerous conditions, and in failing to rectify dangerous conditions that were present, amounted to a breach of defendant's duty to exercise reasonable care.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), contending that it was not in possession and control of the parking lot at the time of plaintiff's fall and therefore could not be held liable for plaintiff's injuries under a premises liability theory. Defendant also argued that plaintiff failed to establish a genuine issue of material fact regarding whether defendant created or had knowledge of the ice patch that caused plaintiff's fall. Mariner's Pointe concurred with defendant's argument that neither defendant nor itself had notice of the icy condition.

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[2] Depending on the type of salt used, the charge for salting the sidewalks was either $12 or $27 an eighty-pound bag.

In response, plaintiff argued that because defendant failed to make reasonable inspections of the parking lot, and therefore could not alleviate the icy condition, defendant failed to exercise reasonable care in the performance of its contractual duties and was therefore negligent. Plaintiff also argued that because defendant entered into a contract with Mariner's Pointe to remove snow and ice and to ensure that the premises were safe, defendant assumed the duty of the premises owner, i.e., Mariner's Pointe, with regard to inspecting the premises for dangerous conditions, and further argued that there was a genuine dispute regarding whether defendant had knowledge of the icy condition. Following oral argument, the trial court concluded that factual issues existed that had to be decided by the jury, and therefore denied defendant's motion in its entirety.

Before trial, plaintiff settled with Mariner's Pointe, and Mariner's Pointe and defendant stipulated to dismiss the third-party action without prejudice. The case then proceeded to trial against defendant. At the close of plaintiff 's case, defendant moved for a directed verdict, which the trial court denied. Defendant then rested without calling any additional witnesses.

Following the closing arguments, the jury found defendant ninety percent negligent, plaintiff ten percent negligent, and awarded plaintiff $45,000 for past and present damages. The jury also awarded plaintiff $1,000 annually, from 1999 to 2030, for future damages.[3] On the basis of this verdict, the trial court entered a judgment awarding plaintiff and John Derbabian $33,445. This figure was arrived at after reducing the judgment by ten percent to account for plaintiff 's comparative negligence and reducing the award to present value and by including taxable costs, mediation sanctions, and interest.

II. Standard of Review

This Court's review of a trial court's grant or denial of a summary disposition motion is de novo. *Dressel v Ameribank*, 247 Mich App 133, 136; 635 NW2d 328 (2001), citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under MCR 2.116(C)(10), we consider "the pleadings, affidavits, depositions, admissions, and any other documentary evidence in a light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists that would preclude judgment for the moving party as a matter of law." *GC Timmis & Co v Guardian Alarm Co*, 247 Mich App 247, 252; 635 NW2d 370 (2000), citing *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

Similarly, we review de novo a trial court's decision regarding a directed verdict. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000); *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000); see also *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Morinelli*, *supra*. A directed verdict

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[3] The jury also awarded John Derbabian $5,000 for his loss of society and consortium claim.

is appropriate only when no factual question exists on which reasonable jurors could differ. *Meagher*, *supra* at 708.

III. Analysis

Defendant first argues that because it did not have possession and control of the parking lot when plaintiff fell, it should not be held liable under a premises liability theory. We agree.

To be liable under a premises liability theory, plaintiff must show that defendant was a possessor of the parking lot at the time of plaintiff's injury. Our Supreme Court has defined a "possessor" of land as:

> "(a) a person who is in occupation of the land with intent to control it or
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> "(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
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> "(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." [*Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980), quoting 2 Restatement Torts, 2d, § 328 E, p 170.]

See also *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 569; 563 NW2d 241 (1997).

To determine whether defendant was a possessor of the parking lot, it is necessary to determine the meaning of the terms "possession" and "control" as used in the definition of "possessor." Neither of these words has previously been defined by Michigan case law; accordingly, relevant dictionary definitions may be consulted in order to determine the plain meaning of these terms. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998); *Michigan Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 568; 519 NW2d 864 (1994); *Hoover Corners, Inc v Conklin*, 230 Mich App 567, 572; 584 NW2d 385 (1998).

Black's Law Dictionary (7th ed) defines "possession," in this context, as "[t]he right under which one may exercise control over something to the *exclusion of all others*" (emphasis added).[4] Here, there is no indication that defendant ever controlled the parking lot to the exclusion of all others. Indeed, it is apparent that defendant was specifically hired to plow and salt the parking lot so that others may have access to it. *Random House Webster's College Dictionary* (1995), p 297, defines "control" as "exercis[ing] restraint or direction over; dominate, regulate, or command." Similarly, Black's Law Dictionary defines "control" as "the power to . . . manage, direct, or oversee." See also *Lanzi v Great Atlantic & Pacific Tea Co*, 1999 WL

[4] The dissent prefers to define "possession" as "[t]he fact of having or holding property in one's power; the exercise of dominion over property." Black's Law Dictionary (7th ed). However, because the etymology of the word "dominion" shows it is likely derived from the concept of ownership, this alternate definition is inappropriate here. See *Random House Webster's College Dictionary* (1995), pp 397-398.

732963; 25 Conn L Rptr 342 (Conn Super 1999).[5] In this case, there is no evidence that the contract between Mariner's Pointe and defendant allowed defendant to exercise direction over, dominate, regulate, or command in relation to the parking lot. Instead, the contract merely indicated that defendant would plow the parking lot when plowing was needed and that defendant would salt the parking lot when defendant determined salting was necessary.

In *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 661; 575 NW2d 745 (1998), the Supreme Court stated that "possession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the *actual exercise of dominion and control over the property*." (Emphasis added.) Thus, "even if the [contract] could be construed as granting defendant the [theoretical] right to control the [parking lot], there is no evidence that defendant [actually] exercised that right" on the day of plaintiff's injury. *Little v Howard Johnson Co*, 183 Mich App 675, 679; 455 NW2d 390 (1990); see also *Kubczak*, *supra*. Rather, the evidence indicated that defendant had not plowed or salted the parking lot since the last snowfall, several days before plaintiff's injury, and that the business tenants of Mariner's Pointe had possession of the parking lot for purposes of conducting business on the day of plaintiff's injury. Therefore, because defendant plowed and salted the parking lot within a reasonable time after the accumulation of snow and then ceded possession of the parking lot to the tenants of Mariner's Pointe for the purpose of conducting business therein, defendant was not in possession of the parking lot at the time of plaintiff's injury. *Anderson v Wiegand*, 223 Mich App 549, 556; 567 NW2d 452 (1997).

In addition, "premises liability is conditioned upon the presence of both possession and control over the land" because the person having such possession and control is "'normally best able to prevent . . . harm to others.'" *Merritt*, *supra* at 552, quoting Prosser, Torts (4th ed), § 57, p 351. See also *Kubczak*, *supra* at 662, quoting *Nezworski v Mazonec*, 301 Mich 43, 56; 2 NW2d 912 (1942). Here, defendant was not the person who was in the best position to prevent plaintiff's injury. Instead, the record indicates that employees of Kroger (a business tenant of Mariner's Point and an invitor of plaintiff) were in the best position to prevent plaintiff's harm. *Anderson*, *supra*; see also *Minton v Krish*, 34 Conn App 361; 642 A2d 18 (1994).[6]

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[5] In *Lanzi*, *supra* at * 1, the court found that even though the defendant, A & P, had hired a snow removal contractor to remove the snow from its lot, "[t]he defendant . . . was obviously in possession of these premises at the time of the injury, and despite hiring of the snow removal contractor, it retained 'control' which has been defined 'as the power or authority to manage, superintend, direct or oversee.' *Alderman v Hanover Ins Group*, 169 Conn 603, 605; 363 A2d 1102 (1975)."

[6] In *Minton*, *supra* at 364-365, the Connecticut Court of Appeals held independent contractors hired to perform a specific job were "shielded from liability upon completion of the work" because at that point control of the premises reverted to the owner of the premises or one in control of them. Applying this rationale to the case before us, even if the contract provided defendant with possession and control over the parking lot, defendant's control had last been exercised on February 18, 1996, when it plowed and salted after the last snowstorm. Following the completion of that performance, the control of the parking lot reverted to Kroger and the other business tenants of Mariner's Pointe. See *Little*, *supra*; see also *Hellman v Droege's Super Market, Inc*, 943 SW2d 655, 660 (Mo App, 1997).

Hence, because (1) nothing in the contract granted defendant "exclusive authority" over the parking lot, (2) defendant did not have actual possession over the parking lot at the time of plaintiff's fall, and (3) Mariner's Pointe's tenants were in the best position to avoid plaintiff's injury, we conclude that defendant "did not exercise the requisite dominion and control over the property and, therefore, [could not] be considered a 'possessor' for purposes of premises liability." *Kubczak, supra* at 664.[7]

Further, assuming defendant was in possession and control of the parking lot at the time of plaintiff's injury, defendant would be liable for plaintiff's injuries only if the condition of the parking lot was caused by defendant's active negligence or the condition "'ha[d] existed a sufficient length of time that [defendant] should have had knowledge of it.'" *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999), quoting *Berryman v K mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992). Because it had not snowed for several days, had only rained a few hours before reverting to freezing temperature, the ice patch was only the size of two parking spaces, and no other person, including plaintiff, had observed the ice before the fall, plaintiff failed to establish that defendant knew or should have known of the icy condition of the parking lot. See *Hampton, supra* at 605-606. Thus, plaintiff failed to establish that defendant had actual or constructive notice of the icy condition of the parking lot and that defendant's inaction (i.e., not salting the lot after raining) was unreasonable. *Id*. at 604.

Because plaintiff did not establish that defendant had notice of the condition of the parking lot, we find the present situation distinguishable from *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 708; 532 NW2d 186 (1995). There, the defendant was found liable because of active negligence in removing the snow from the premises and placing it on a portion of the premises where the defendant knew or should have known it would melt and refreeze. *Id*. at 704. The plaintiff in *Osman* also alleged that the defendant was negligent in failing to keep the premises safe *after* the defendant had *actual notice* of the dangerous condition. *Id*. Here, the evidence did not establish that defendant negligently plowed or salted the parking lot or that defendant had actual knowledge of the dangerous condition; rather, at best, the evidence proved merely that defendant did not inspect and salt the parking lot on the morning of plaintiff's fall. Thus, unlike *Osman*, where the defendant acted under the contract but did so negligently, plaintiff's assertion that defendant was negligent here can only derive from defendant's alleged nonperformance of the contract. While *Courtright v Design Irrigation, Inc*, 210 Mich App 528, 531; 534 NW2d 181 (1995), provides that a person who undertakes a service for another is subject to liability to a "'third person for physical harm resulting from his failure to exercise reasonable care'" if "'he has undertaken . . . a duty owed by the other to the third person,'" *id*., quoting 2 Restatement Torts, 2d, § 324A, p 142, under the circumstances here there

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[7] For these reasons, the pretrial deposition testimony cited by the dissent does not conflict with our conclusion that defendant did not have possession of the premises. In addition, because we conclude that summary disposition should have been granted, and because plaintiff did not oppose summary disposition on the basis that additional discovery was required, the trial testimony of Paul Gross, Steven Ziemba, and Alene Chernick referenced by the dissent is irrelevant and inapplicable to our analysis.

was no genuine issue of material fact that defendant did not unreasonably fail to salt the parking lot. Thus, *Courtright* is distinguishable and of little import here. See *Hampton*, *supra* at 604.[8]

Finally, *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), and *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 212; 565 NW2d 907 (1997), held that a party to a contract may be held liable in tort for an injury suffered by a third party (i.e., a person not party to the contract) who is foreseeably injured by the negligent performance of the contract. In the instant case, plaintiff has not alleged that defendant negligently performed a contract; rather, plaintiff alleged that defendant was negligent because of its failure to perform a contract. Accordingly, *Clark* and *Auto-Owners* are distinguishable from the instant case; indeed, this case is more akin to *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956), and *Freeman-Darling, Inc v ASR, Inc*, 147 Mich App 282, 284-286; 382 NW2d 769 (1985).

In *Freeman-Darling*, this Court stated that "'a tort action will not lie when based *solely* on nonperformance of a contractual duty.'" *Id*. at 284, quoting *Crews v General Motors Corp*, 400 Mich 208, 226; 253 NW2d 617 (1977) (emphasis in original). Here, defendant's negligence occurred, if at all, because defendant did not inspect and salt the Mariner's Pointe parking lot after it had rained.[9] Therefore, the proper question to be resolved is whether plaintiff had an independent action in tort against defendant regardless of whether defendant breached the contract with Mariner's Point. See *Dahlman v Oakland Univ*, 172 Mich App 502, 506; 432 NW2d 304 (1988). Because defendant had no common-law duty to plow, inspect, or salt the parking lot in which plaintiff was injured, we find that defendant did not breach a duty of due care to plaintiff when it failed to inspect the parking lot on the day in question, and that plaintiff does not have an independent tort action against defendant.

IV. Conclusion

Because plaintiff failed to establish a genuine issue of material fact regarding whether defendant (1) was in possession and control of the parking lot, (2) had knowledge of the icy condition, and (3) was unreasonable in its failure to salt the parking lot given the weather conditions, *Hampton*, *supra* at 604, we hold that defendant owed no duty to plaintiff; accordingly, we reverse the entry of judgment in favor of plaintiff and remand with instructions for the trial court to enter an order granting defendant summary disposition pursuant to MCR 2.116(C)(10). Because we find that there was no genuine issue of material fact to warrant trial, we do not address either defendant's arguments challenging the trial court's denial of defendant's motion for a direct verdict or defendant's arguments challenging various evidentiary rulings at trial.

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[8] We also believe that *Courtright* was wrongly decided. If we were unable to distinguish the present case (i.e., by our finding that defendant did not act unreasonably under the facts of this case), we would declare a conflict, MCR 7.215(I)(2), and only follow *Courtright* pursuant to MCR 7.215(I)(1).

[9] In this regard, we note again that plaintiff does not allege that defendant negligently plowed and salted the parking lot after the last snowfall.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Zahra, J., concurred.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra